In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

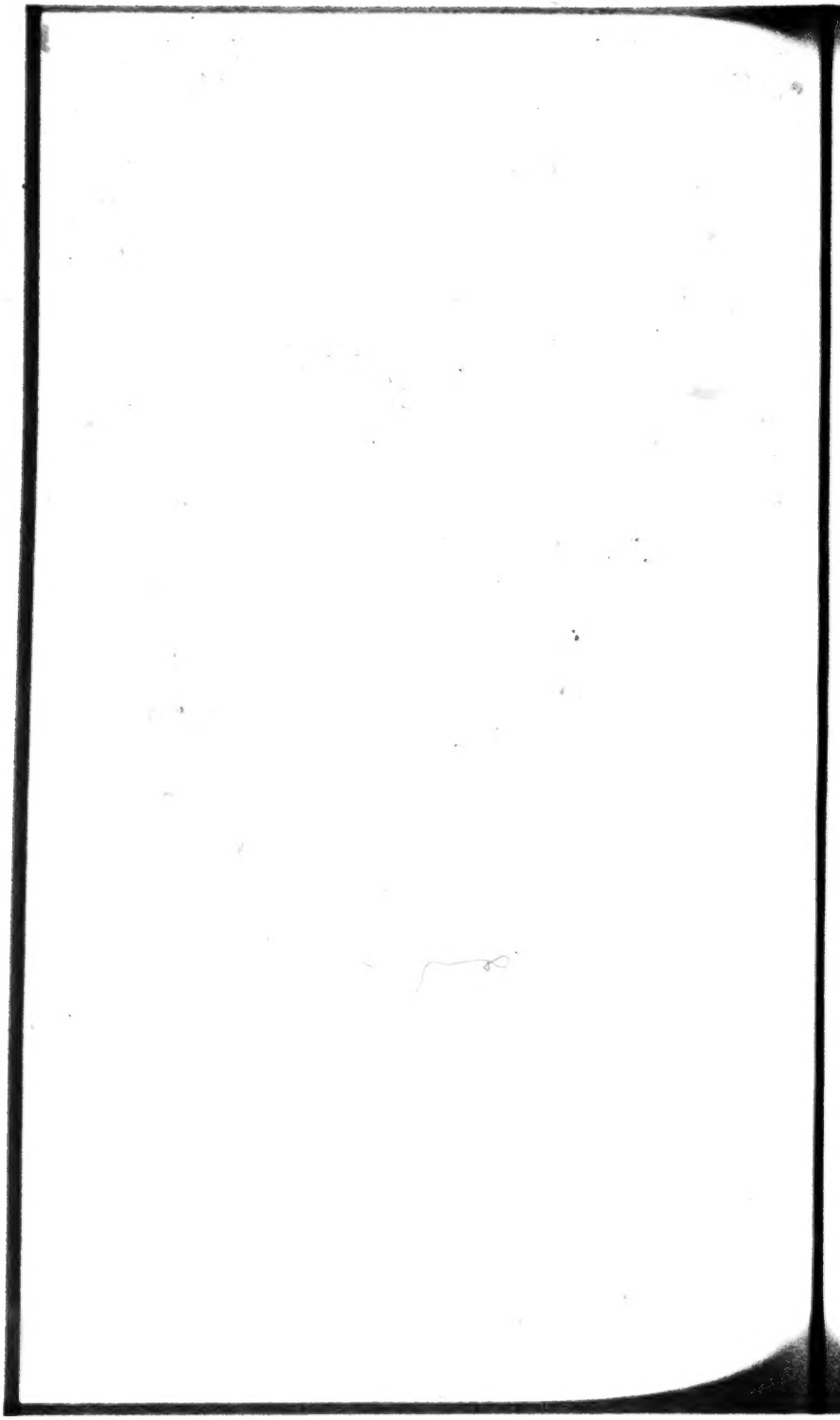
Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF APPELLEES

LeROY COLLINS,
Of Counsel
Ervin, Varn, Jacobs & Odom

JOSEPH C. JACOBS
of the law firm of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, Florida 32302
and
JOHN B. CHANDLER, JR.,
Rogers, Towers, Bailey, Jones & Gay
Florida Title Building
Jacksonville, Florida 32202
and
STEWART D. ALLEN
Sunset House
5825 Sunset Drive
South Miami, Florida
Attorneys for Appellees



SUBJECT INDEX

	Page
REPORT OF OPINION, JURISDICTION AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	10
ARGUMENT:	
Point I — The District Court correctly held unconstitutional Chapter 70-224, Laws of Florida, published as Chapter 376, Florida Statutes (1970), as an attempt to legislate substantive maritime law which, under Article III, Section 2, Clause 3, United States Constitution, is exclusively within the federal domain	11
A. Constitutional history	11
B. Judicial evolution	16
C. The law relied on by the lower court	23
D. The law applied to the case at bar	33

INDEX (cont.)

Point II — Chapter 70-224, Laws of Florida, is unconstitutional as it is in direct conflict with federal statutes in an area which has been preempted by federal statutes 36

A. The entire body of federal admiralty law preempts the field 36

B. Police power is not applicable 55

Point III — Chapter 70-224, Laws of Florida, violates the Commerce Clause of the United States Constitution as the power of Congress to regulate foreign and interstate commerce is supreme 59

A. The Florida Act violates the Commerce Clause of the United States Constitution as it imposes an undue burden on interstate and foreign commerce 63

B. The Florida Act violates the Commerce Clause of the United States Constitution as the Florida Act relates to a "national" problem requiring uniformity 70

CONCLUSION 74

TABLE OF AUTHORITIES

Cases	Page
American Bridge Co. v. The Gloria O, 98 F.Supp. 71 (E.D.N.Y. 1951)	49
Arizona v. California, 283 U.S. 423 (1931)	75
Baltimore and Ohio Railroads Co. v. Maryland, 21 Wall. 456 (1875)	22
Belfast v. Boon, 7 Wall. 624 (1869)	19
Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947)	40, 55
Bibb v. Navajo Freight Lines, 359 U.S. 530 (1959)	63, 71
Board of Trustees of the University of Illinois v. The United States of America, 289 U.S. 48 (1923)	62
British Transport Co. v. United States, 354 U.S. 129 (1957)	46
Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R., 393 U.S. 192 (1968)	64, 65, 70
Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962)	32

TABLE OF AUTHORITIES (cont.)

Case	Page
California v. S.S. Bournemouth, 307 F.Supp. 922 (DC 1969) and 318 F.Supp. 839, 10 A.L.R.Fed. (1970)	50
California v. Thompson, 313 U.S. 109 (1940)	64
Chevron Oil Co. v. Huson, — U.S. —, 30 L.Ed.2d 296 (1971)	29A
Cooley v. Board of Wardens, 12 How. 299, 12 L.Ed. 996 (1851)	55, 64, 71
The Daniel Ball, 10 Wall. 557 (1870)	59
DeBardeleben Coal Corp. v. Henderson, 142 F.2d 481 (1944)	32
Detroit Trust Co. v. Steamer "Thomas Barlum", 293 U.S. 21 (1934)	23
Fematt v. City of Los Angeles, 196 F.Supp. 89 (S.D.Cal. 1961)	49
Ferguson v. Skrupa, 372 U.S. 726 (1963)	75
Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963)	38, 39, 40, 51, 71

TABLE OF AUTHORITIES (cont.)

Case	Page
In Re Garnett, 141 U.S. 1 (1891)	22
The Genesee Chief v. Fitzhugh, 12 How. 443 (1851)	47, 59
Gibbons v. Ogden, 9 Wheat. 1 (1824)	59, 62, 70
Gilman v. Philadelphia, 3 Wall. 724 (1865)	60
Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963)	49
Hall v. DeCuir, 5 Otto 485 (1877)	59, 63
Henderson v. Wickham, 92 U.S. 259 (1876)	60
Huron Portland Cement Co. v. Detroit, 362 U.S. 40	56, 64, 70
Jackson v. The Steamboat Magnolia, 20 How. 296, 15 L.Ed. 909 (1858)	21
Just v. Chambers, 312 U.S. 383 (1940)	29

TABLE OF AUTHORITIES (cont.)

Case	Page
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	25, 71
Lord v. Goodall, Nelson & Perkins Steamship Co., 12 Otto 541 (1880)	59, 60, 61
The Lottawanna, 21 Wall. 558, 22 L.Ed. 654 (1875)	53
McCray v. United States, 195 U.S. 27 (1904)	75
New England Marine Ins. Co. v. Dunham, 11 Wall. 1 (1871)	19
Northern States Power Co. v. State of Minnesota, 447 F.2d 1143 (8CA 1971), aff'd — U.S. —, 31 L.Ed.2d 569, 92 S.Ct. — (1972)	36, 39, 57, 58
Norris v. City of Boston, 7 How. 283 (1849)	59, 70
Norwich and New York Transportation Co. v. Wright, 13 Wall. 104 (1871)	46
O'Donnell v. GreatL akes Dredge & Dock Co., 318 U.S. 36 (1943)	21, 48
Parker v. Brown, 317 U.S. 341 (1942)	64

TABLE OF AUTHORITIES (cont.)

Case	Page
Petition of New Jersey Barging Corp., 168 F.Supp. 925 (1958)	50, 52
Philadelphia & S. Mail SS. Co. v. Pennsylvania, 122 U.S. 326 (1887)	71
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	65, 69, 71
Providence and N.Y. SS. Co. v. Hill Mfg. Co., 109 U.S. 578, 27 L.Ed. 1038 (1883)	46
Ramsay v Allegre, 12 Wheat. 611 (1827)	20, 47
Robbins v. Shelby, 120 U.S. 489 (1887)	71
Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969)	35, 49
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	53
Simpson v. Shepherd, 230 U.S. 352 (1912)	70, 71
South Carolina Highway Dept. v. Barnwill Bros., 303 U.S. 177 (1938)	64, 70

TABLE OF AUTHORITIES (cont.)

Case	Page
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)	63, 71
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	23
Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943)	29, 30
State Board of Ins. v. Todd Shipyard Corp., 370 U.S. 451 (1962)	33
Toomer v. Witsell, 334 U.S. 385 (1948)	64
United States v. Matson Navigation Co., 201 F.2d 610 (CA9 1953)	49
United States v. O'Brien, 391 U.S. 367 (1968)	74
United States v. Pabst Brewing Co., 384 U.S. 546 (1966)	75
Veazie v. Moor, 14 How. 568 (1852)	59, 61
Victory Carriers v. Law, — U.S. —, 30 L.Ed.2d 383, 92 S.Ct. — (1971)	32, 48

TABLE OF AUTHORITIES (cont.)

Case	Page
Wacirema Operating Co. v Johnson, 396 U.S. 212 (1969)	49
Waring, et al. v. Clarke, 5 How. 441 (1847)	21, 47
Washington v. Dawson, 264 U.S. 219 (1923)	26
Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)	43
Wyandotte Trans. Co. v. United States, 389 U.S. 191 (1967)	46, 50
UNITED STATES CONSTITUTION	
Article I, Section 8	34, 63, 70
Article III, Section 2	34, 42
Article VI	37
STATUTES — FEDERAL	
28 U.S.C. 1333	48
33 U.S.C. Section 409, 414, 419 (Fed. Wreck Stat.)	39, 50, 54

TABLE OF AUTHORITIES (cont.)

Page

Section 901-50 (1958), 44 Stat. 1426-27, 1429, 1431-32, 1434-46 (1929), (Longshoremen's and Harborworkers' Compensation Act) 27

Section 1161(g) 67

Section 1161(o) 39, 42

1 Stat. 27 (1789) 20

1 Stat. 55 (1789) 20

1 Stat. 131 (1790) 20, 59

Section 1161(o)(1) 47, 54

Section 1161(o)(2) 53, 54

Section 1161(o)(3) 54

Section 1161(p) 68, 72

43 U.S.C. Sections 1131, et seq., 67 Stat. 462 (Outer Continental Shelf Lands Act) 35

46 U.S.C.

Section 181-189, 9 Stat. 635 (Limitation of Liability Act) 39, 43, 54, 67

Section 740 (Admiralty Extension Act) ... 39, 49, 50, 54

Section 761, et seq. (Death on the High Seas Act) 35

TABLE OF AUTHORITIES (cont.)

STATUTES — STATE

	Page
Chapter 70-224, Laws of Florida, 1970	78
Chapter 376, Florida Statutes, 1970	51
Section 376.021(5)	67
Section 376.021(6)	33
Section 376.07	63, 73
Section 376.07(2)(a)	34, 63, 70
Section 376.08(2)	34
Section 376.11	67
Section 376.12	34, 62, 66, 67, 72
Section 376.14	66, 67
Section 376.15	51
Section 376.16	50

LAW REVIEW ARTICLES

Avins, Absolute Liability for Oil Spillage, 36 Brooklyn Law Review 359 (1970)	18

BOOKS

Antieau, **Modern Constitutional Law**, Vol. 2 (1969)	17
Baer, **Admiralty Law and The Supreme Court** (1969)	44, 47

TABLE OF AUTHORITIES (cont.)

Page

Benedict, **The Law of American Admiralty** (6th Ed. 1940) Vol. 1 17

Farrand, **The Records of the Federal Convention of 1787**, Vol. 2 (1966) 11, 12, 15, 16

Farrand, **The Records of the Federal Convention of 1787**, Vol. 3 (1966) 12, 13, 14

The Federalist #80 (Hamilton) from McLean's Edition, New York, 1788 ..... 15, 16

Gilmore and Black, **The Law of Admiralty** (1957) 18, 44, 46

Prosser, **Torts**, 533-541 (3rd Ed. 1964) 68

Prosser, **Torts**, Sec. 78 (3rd Ed. 1964) 68

OTHER STATE STATUTES

Alaska, Statutes Title 46, Ch. 05 (1968, 1970) 77

Maine Title 38:

Section 541-557 (1970) 77

Section 546(4)(a) 73

Massachusetts:

St. 827, Section 50B 72

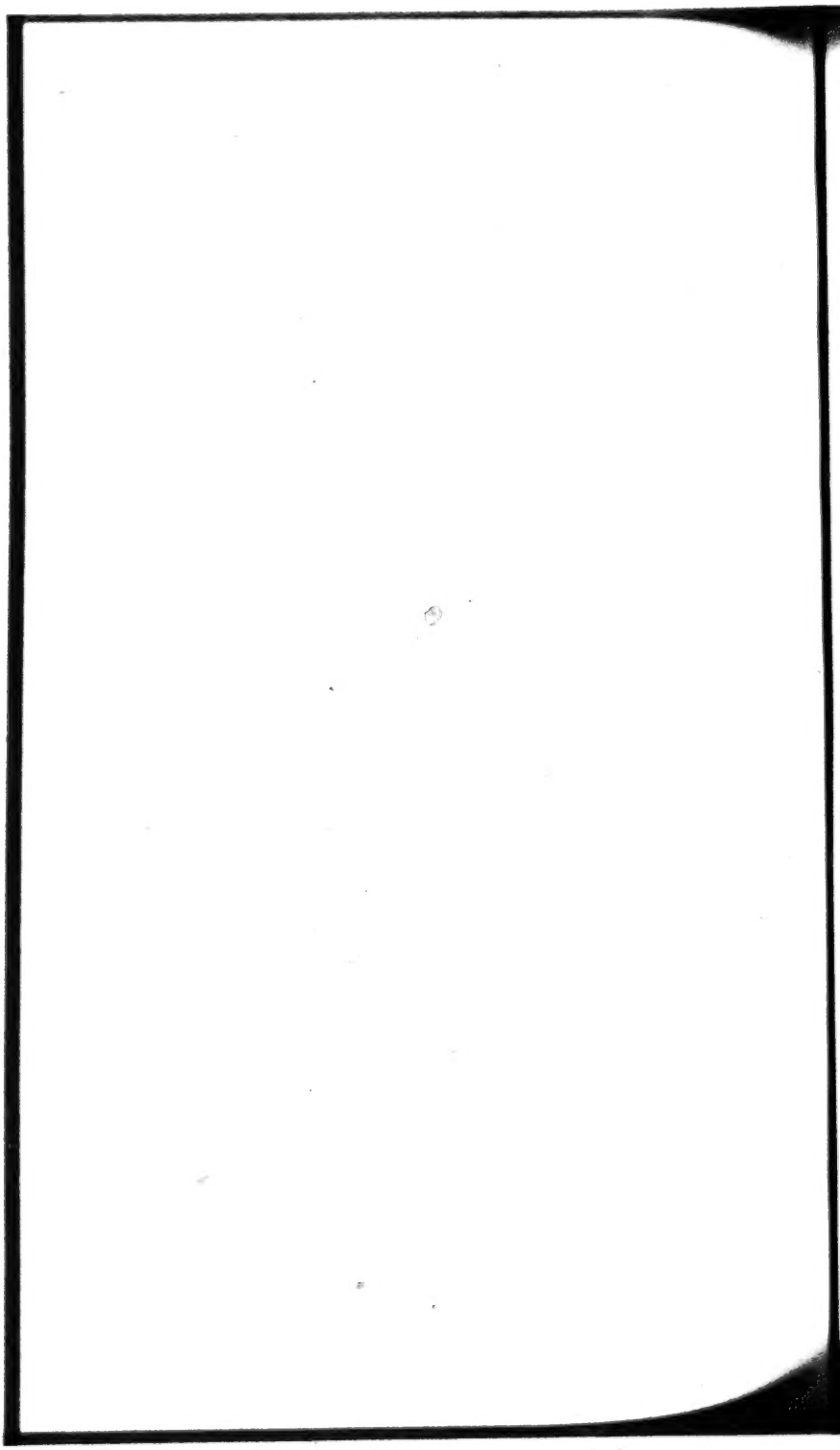
St. 837, Section 4.0 73

TABLE OF AUTHORITIES (cont.)

	Page
Act 167, Public Acts of 1970	73
Ann. Laws of Mass., Ch. 21, Section 27(10), 50-52	77
Michigan:	
Section 3-533 (209), C210	73
Water Pollution Control Act of 1970, Act 167, 1970	77
Washington:	
RCW 88.8, 11	73
RCW 90.48.315, et seq.	77

OTHER AUTHORITIES

2 C.J.S. Admiralty §2b	19
2 Am.Jur.2d Admiralty §7	19
16 Am.Jur.2d Constitutional Law §259-262	55
Rule F of the United States Supreme Court, Supplemental Rules for Certain Admiralty and Maritime Claims	44



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF APPELLEES

THE AMERICAN WATERWAYS OPERATORS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDEN-DURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS INC., a Delaware corporation; OIL TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE INC., a

Delaware corporation; THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTERSTATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; and GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida,

REPORT OF OPINION, JURISDICTION AND STATUTES INVOLVED

Pursuant to Rule 40 Supreme Court Rules and Paragraph 3 thereof, Appellees adopt Appellants Report of Opinion, Jurisdiction and Statutes involved.

QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT ERRED IN HOLDING UNCONSTITUTIONAL CHAPTER 70-224, LAWS OF FLORIDA, PUBLISHED AS CHAPTER 376, FLORIDA STATUTES (1970), AS AN ATTEMPT TO LEGISLATE SUBSTANTIVE MARITIME LAW WHICH, UNDER ARTICLE III, SECTION 2, CLAUSE 3, UNITED STATES CONSTITUTION, IS EXCLUSIVELY WITHIN THE FEDERAL DOMAIN.

II.

WHETHER CHAPTER 70-224, LAWS OF FLORIDA, IS UNCONSTITUTIONAL AS IT IS IN DIRECT CONFLICT WITH FEDERAL STATUTES IN AN AREA WHICH HAS BEEN PREEMPTED BY THE FEDERAL STATUTES.

III.

WHETHER CHAPTER 70-224, LAWS OF FLORIDA, IS UNCONSTITUTIONAL AND VIOLATIVE OF THE COMMERCE CLAUSE SINCE IT SEEKS TO REGULATE FOREIGN AND INTERSTATE COMMERCE, A QUESTION NOT DEALT WITH BY THE LOWER COURT.

STATEMENT OF THE CASE

The opinion of the court below provides a clear and concise statement of the case and the factual background relating thereto. Excluding citations of authority and material not pertinent to this appeal, the lower court found as follows:

> "During the 1970 session the Florida Legislature passed the 'Oil Spill Prevention and Pollution Control Act' . . . The Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutant while destined for or leaving any Florida port. Onshore and offshore terminal facilities are subject to the same liability. The Act requires every

owner or operator of a vessel using a Florida port or a terminal facility to pay whatever clean up costs or damages may result from the discharge of pollutants and to maintain satisfactory evidence of financial responsibility to satisfy such liability. The Department of Natural Resources (State) is empowered to require any vessel transporting a pollutant in state waters to be equipped with specified containment gear and a crew trained in its use. Prior to entering a Florida port, every vessel is subject to inspection by the port manager (State) to determine the presence of the required containment gear and the seaworthiness of the ship. He is required to notify all other ports in the state of any vessel refused entry to his port.

"Plaintiffs and intervenors (Appellees) include merchant shippers whose vessels use Florida ports in the course of transporting goods in foreign and interstate commerce; world shipping associations who insure three-fourths of the ocean-going tonnage against, among other things, liability for oil spillage; a substantial portion of the barge and towing industry operating along the Florida coast; and owners of oil terminal facilities located in Florida ports. They have challenged the validity of the Florida Act on several federal constitutional grounds. . . .

"The maritime law of the United States has evolved under Article 3, and Section 2, of the Constitution which extends the judicial power of

the United States 'to all Cases of admiralty and maritime jurisdiction.' . . . Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. It comprises traditional admiralty rules and concepts found initially in the European authorities. These rules and concepts have been augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation. Further changes in the corpus of maritime law have been effected by a variety of congressional enactments and administrative regulations. One of these congressional enactments is the Water Quality Improvement Act of 1970 which became law a few months (April 3, 1970) prior to the effective date of the Florida Act (July 1, 1970). W.Q.I.A. provides plaintiffs with tangible evidence that the Florida Act is an unconstitutional intrusion into the federal maritime domain.

"The W.Q.I.A. reinforces the national anti-water pollution policy. In this act Congress declared that there should be no discharge of oil into or upon the navigable waters and shorelines of the United States. The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill. Where the spillage results from willful negligence or misconduct, however, liability for such costs can be unlimited. Evidence

of financial responsibility sufficient to cover its potential liability must be given by any vessel of 300 gross tons or more that uses the navigable waters of the United States. Additionally, the President is authorized to issue regulations requiring, among other things, that vessels maintain oil spill prevention equipment and be subject to boarding for inspection purposes at any time.

"In adopting W.Q.I.A. Congress anticipated that all hazardous substances, in addition to oil, capable of polluting navigable waters would be subject to similar legislative treatment. W.Q.I.A. required the President to promulgate regulations defining such hazardous substances and establishing methods and means for their removal. . . .

"That the Florida Act constituted unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities.

"While both W.Q.I.A. and the Florida Act subject vessels and onshore and offshore facilities to strict liability for cleanup costs, the latter imposes a far greater measure of responsibility. For example, W.Q.I.A. would excuse a shipper who demonstrates that the oil spill was caused by

act of God, an act of war, or the act or omission of a third party. The Florida Act recognizes none of these defenses to a claim by the state for cleanup costs. The state is entitled to judgment simply by pleading and proving 'the fact of the prohibited discharge.' Moreover, the amount of the recovery would be unlimited; whereas W.Q.I.A. would place a limit on exposure, as we have previously noted.

"There is perhaps an even greater contrast between maritime law and the Florida Act in compensating state or private interests for property damage, as distinguished from cleanup costs. W.Q.I.A. creates responsibility for cleanup costs only and leaves undisturbed the remedies available under maritime law for private injury caused by oil spillage or other pollution. The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded. Compensation is recoverable for injury to property and allowances have even been made for consequential damages. . . .

"The recovery of damages in such cases is predicated on proof of negligence or unseaworthiness. . . .

"Under the Florida Act, however, liability without fault is the foundation for 'damage incurred by the state and for damage resulting from injury to others,' just as it is in the case of cleanup costs. By substituting absolute liabil-

ity for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters.

"It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field. . . .

* * *

". . . If applied to the plaintiffs and intervenors (Appellees) in this case, the Florida Act would effect—in the words of **Jensen**—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

"This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. . . .

* * *

"For the foregoing reasons we conclude that the Florida Act in question cannot constitutionally be applied to the plaintiffs and intervenors and to the activities in which they engage. . . .

* * *

"In the Florida Act there are no provisions which, though standing by themselves might be

considered unobjectionable, are not so interwoven in purpose and scheme with the invalid provisions of the Act as to permit the operation of the severability clause. . . . The provisions that do not directly frustrate the federal maritime law are so few that, considered together, they would not comprise a coherent legislative scheme. Accordingly, the Act in its entirety must fall." (A. 39-44)

* * *

In light of these findings, the lower court concluded that by the Florida Act the state had sought to legislate substantive maritime law which, under the United States Constitution, was exclusively in the federal domain. Thus, the contention that the Act violated the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not considered.

SUMMARY OF ARGUMENT

I.

The history of the constitutional convention reveals that the founders of our present system of government recognized the need for a harmonious body of maritime laws to be applied and interpreted with uniformity throughout the country. The United States Supreme Court has, through its opinions and rules, developed this concept into a system in which this necessary uniformity is protected by the exclusive congressional power to pass admiralty legislation and the border line between state and admiralty jurisdiction is defined by this congressional legislation and judicial opinion. It was out of this system that the decisions relied on the court below evolved, and it is because the Florida Act clearly flies in the face of this system that it is unconstitutional.

II.

The concept of statutory preemption is a limitation on the alleged police power invoked by Florida as justification for the State Act. Due to the Supremacy Clause in the United States Constitution, the entire body of maritime law is superior to any similar state statute and especially to the Florida Statute which is a direct affront to many basic maritime concepts. The Water Quality Improvement Act (W.Q.I.A.) (See pages 75-90) and regulatory procedures authorized and activated thereunder complement and implement the prior maritime statutes and thus create such a comprehensive statutory and regulatory scheme that there is no room for paralleling and conflicting state action.

III.

The Florida Act is a direct attempt to regulate an industry engaged largely in interstate and foreign commerce. Congress, via the Commerce Clause, has supreme authority to legislate in the field of foreign and interstate commerce. Contrary to the Commerce Clause power, Florida has passed legislation which imposes an undue burden on interstate and foreign commerce. The regulation of the shipping industry is a national problem which requires uniformity. To allow Florida (and thus other states) to legislate in this area is to destroy this uniformity, and this is a violation of the Commerce Clause.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD UNCONSTITUTIONAL CHAPTER 70-224, LAWS OF FLORIDA, PUBLISHED AS CHAPTER 376, FLORIDA STATUTES (1970), AS AN ATTEMPT TO LEGISLATE SUBSTANTIVE MARITIME LAW WHICH, UNDER ARTICLE III, SECTION 2, CLAUSE 3, UNITED STATES CONSTITUTION, IS EXCLUSIVELY WITHIN THE FEDERAL DOMAIN.

A. Constitutional History

One source of aggravation which led the American colonies to revolt against England was the requirement that the colonies could ship only in English bottoms. Farrand, **The Records of the Federal Convention of 1787,**

Vol. 3, p. 303 (1966). When the quest for independence was successfully completed and the time came to formulate a replacement form of government for the much too loose Articles of Confederation, the concern over admiralty law was still fresh in the minds of those who attended the Constitutional Convention. See Farrand, Vol. 3, pp. 164-167, 211, 214. The prime task of that convention was to chart areas of power and responsibility for a new national convention. The members of the convention realized that in certain areas, unified action and uniform laws would obviously be required. Thus, provision was made for a uniform system of coinage, weights and measures. Likewise, the powers of determining war and peace, creating a postal system and receiving ambassadors were fixed at the national level. The subject of admiralty and maritime law was also deemed firmly established within this category.

One need only peruse the records of the convention to see that the drafters of the Constitution never questioned the need for uniformity of maritime laws. The only real questions concerning admiralty which arose during the convention were whether the uniform system of maritime laws would be promulgated by a simple majority of Congress or whether maritime laws could be passed only with a two-thirds vote of both houses of Congress, which would insure uniformity of consent as well as uniformity of laws.

Alexander Hamilton explained the situation to the New York Convention on June 20, 1788, in the following manner:

> "In order that the committee may understand clearly the principles on which the general Convention acted, I think it necessary to explain

some preliminary circumstances. Sir, the natural situation of this country seems to divide its interests into different classes. There are navigating and non-navigating states. The Northern are properly navigating states: the Southern appear to possess neither the means nor the spirit of navigation. This difference of situation naturally produces a dissimilarity of interests and views respecting foreign commerce. It was the interest of the Northern States that there should be no restraints on their navigation, and they should have full power, by a majority in Congress, to make commercial regulations in favor of their own, and in restraint of the navigation of foreigners. The Southern States wish to impose a restraint on the Northern, by requiring that two thirds in Congress should be requisite to pass an act in regulation of commerce. They were apprehensive that the restraints of a navigation law would discourage foreigners, and, by obliging them to employ the shipping of the Northern States, would probably enhance their freight. This being the case, they insisted strenuously on having this provision ingrafted in the Constitution, and the Northern States were as anxious in opposing it. On the other hand, the small states, seeing themselves embraced by the Confederation upon equal terms, wished to retain the advantages which they already possessed. The large states, on the contrary, thought it improper that Rhode Island and Delaware should enjoy an equal suffrage with themselves. From these sources a delicate and difficult contest arose. It became necessary, therefore, to compromise, or the Con-

vention must have dissolved without effecting any thing. Would it have been wise and prudent in that body, in this critical situation, to have deserted their country? No. Every man who hears me, every wise man in the United States, would have condemned them. The Convention were obliged to appoint a committee for accommodation. In this committee, the arrangement was formed as it now stands, and their report was accepted. It was a delicate point, and it was necessary that all parties should be indulged. Gentlemen will see that, if there had not been a unanimity, nothing could have been done; for the Convention had no power to establish, but only to recommend, a government. Any other system would have been impracticable. Let a convention be called to-morrow; let them meet twenty times, —nay, twenty thousand times; they will have the same difficulties to encounter, the same clashing interests to reconcile. . . ." Farrand, Vol. 3, pp. 332, 333.

The compromise reached is our present system in which uniform laws of admiralty are passed by a majority vote in Congress and the minority must follow.

The uniformity required for laws at sea was also brought into the debates concerning the insertion of "define" before "punish" in the Article I, Section 8, United States Constitution, provision which gives Congress the power "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." In support of the addition of the word "define" James Madison said:

"... felony at common law is vague. It is also defective. One defect is supplied by Stat: of Anne as to running away with vessels which at common law was a breach of trust only. Besides no foreign law should be a standard farther than is expressly adopted—If the laws of the States were to prevail on this subject, the citizens of different States would be subject to different punishments for the same offence at sea—There would be neither uniformity nor stability in the law—The proper remedy for all these difficulties was to vest the power proposed by the term "define" in the Natl. legislature." Farrand, Vol. 2, page 316.

It should also be mentioned that the convention at one time even considered a separate Department of Admiralty equal in stature to the Departments of War and Treasury. See Farrand, Vol. 2, p. 136.

The uniform maritime laws would need uniform application and thus the convention delegates gave exclusive jurisdiction to the federal courts:

"... The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction." The Federalist #80 (Hamilton), from McLean's Edition, New York, 1788, p. 519.

When writing about the class of case exclusively within the federal jurisdication (admiralty being a member of the class), Hamilton made the following remark:

> ". . . If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." The Federalist #80 (Hamilton), from McLean's Edition, New York, 1788, p. 519.

The same concern for uniformity of admiralty matters is shown by the convention records concerning the equal treatment for ports provision of Article I, Section 9, clause 6, United States Constitution. See Farrand, Vol. 2, pp. 410, 417, 418, 421.

B. Judicial Evolution.

It can be clearly seen that the history of the creation of our Federal Constitution justifies the view that Congress alone is vested with the power to legislate in the field of admiralty. The various commentators on admiralty and constitutional law have recognized this to be the case.

In Benedict's great treatise on admiralty, the following description of the federal power to legislate in the field of admiralty is found:

". . . In no manner could a uniform administration of that great branch of the law of nations, known as the general maritime law, be secured except by the transfer of all cases of admiralty and maritime jurisdiction to the cognizance of the national judiciary and by committing to Congress the authority to make all laws necessary and proper to carry into execution the power so vested, as by altering and amending the maritime law under which such cases are adjudged and adjusting the jurisdictional limits.

"In the exercise of their admiralty jurisdiction, the Federal courts are not bound by State statutes. State legislation, though recognized in remedial aspects consistent with the general principles and uniform operation of the maritime law, is not permitted to displace the characteristic features of the maritime law or to impair that uniformity which in international and interstate relations the Constitution designed to establish in conferring the maritime power upon the United States." (Citations omitted.) Benedict, **The Law of American Admiralty** (6th Edition 1940), Vol. 1, pp. 14, 15.

In the text of **Modern Constitutional Law**, the following is found:

"The United States Constitution, in Article III, §2, provides that the federal judicial power shall extend 'to all Cases of Admiralty and maritime Jurisdiction.' The United States Supreme Court has ruled that this clause can be read together

with the 'necessary and proper' clause of Article I, §8, of the Constitution, so as to give Congress paramount power to legislate on maritime and admiralty matters. . . ." Antieau, **Modern Constitutional Law**, Vol. 2 (1969), p. 28.

Gilmore and Black, **The Law of Admiralty** (1957) at page 18, recognizes that the jurisdictional grant is also a grant of power over substantive maritime law.

In a law review article concerning liability for oil spills, the congressional preeminence in the field was likewise recognized:

". . . The states have no control over maritime commerce, even when it affects state coastlines. This is the exclusive domain of the federal government. As early as the classic opinion of Chief Justice John Marshall in 1824 in **Gibbons v. Ogden**, it was held that the power to regulate even coastwise shipping was in the federal government. The right to make admiralty rules is now a settled exclusive federal right. Accordingly, the state legislatures, by statute, and the state courts, by common law decision, cannot solve the problem of liability for oil spillage from tankers, even by applying the well-settled principles of the common law to this new situation..

"Action by Congress is therefore needed. . . ." (Citations omitted.) Alfred Avins, "Absolute Liability for Oil Spillage," 36 Brooklyn Law Review 359 at 367 (1970).

As with the commentators, the writers of the encyclopedias of law recognize the exclusive federal legislative control over admiralty laws:

> ". . . Congress derives its control over maritime matters from those provisions of the federal constitution conferring general power to legislate and from the provisions dealing specifically with admiralty and maritime jurisdiction, and not from the commerce clause. . . ." 2 C.J.S. Admiralty §2(b), p. 64.

> "In view of the constitutional provision granting admiralty and maritime jurisdiction to the federal courts, and the provision authorizing the making of all laws necessary and proper for carrying into execution the powers vested in the government of the United States, Congress has full and paramount legislative power in admiralty and maritime matters. . . ." 2 Am.Jur.2d Admiralty §7, p. 723.

The above stated views exist because of the vast amount of support they find in the decisions of this Court. As with many of the judicial concepts which have evolved in this nation, American admiralty law was first adopted from the admiralty law of not only England but the entire maritime commercial world. **New England Marine Ins. Co. v. Dunham**, 11 Wall. 1 (1871). From this basis our admiralty law has developed with the guidance of the Constitution, the laws of Congress and the decisions of the Supreme Court. **Belfast v. Boon**, 7 Wall. 624 (1869).

Of particular concern in the case at bar is the development of admiralty as a legislative grant. In the infancy of our nation, the First Congress passed laws dealing with

such admiralty matters as Tonnage Duty, I Stat. 27 (1789); Ship Registry, I Stat. 55 (1789); and Government and Regulation of Seamen, I Stat. 131 (1790). At first there was some confusion as to the basis of the new nation's admiralty laws. Some jurists held the conviction that the coverage of American admiralty law was limited to the scope of its English counterpart. An example of this view can be found in a lengthy concurring opinion by Mr. Justice Johnson in **Ramsey v. Allegre**, 12 Wheat. 611 (1827). Johnson felt that the admiralty law adopted from England at the time of the Constitution was predominant when confronted with a conflicting congressional law. This interpretation, which tended to make American admiralty subservient to the whims of the English, was banished as totally unreasonable.

> "But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of 'all cases of admiralty and maritime jurisdiction,' as it is expressed in the Constitution, to the cases of admiralty and maritime jurisdiction in England when our Constitution was adopted. To do so would make the latter a part and parcel of the Constitution—as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the Constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England—a limitation which never could have

been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States 'to all cases of admiralty and maritime jurisdiction.' . . ." **Waring, et al. v. Clarke,** 5 How. 441 at 457 (1847).

More modern courts have accepted this rendition of Congress' power to legislate contrary to the traditional foreign admiralty law.

"But it cannot be supposed that the framers of the Constitution contemplated that the maritime law should forever remain unaltered by legislation, The Lottawanna (Rodd v. Heartt) supra (21 Wall. (US) 577, 22 L.Ed 662), or that Congress could never change the status under the maritime law of seamen, who are peculiarly the wards of admiralty, or was powerless to enlarge or modify any remedy afforded to them within the scope of the admiralty jurisdiction. There is nothing in that grant of jurisdiction—which sanctioned our adoption of the system of maritime law—to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require. . . ." **O'Donnell v. Great Lakes Dredge & Dock Co.,** 318 U.S. 36 at 40 (1943).

In his dissent in **Jackson v. The Steamboat Magnolia,** 20 How. 296, 15 L.Ed. 909 at 913 (1858), Justice McLean said, ". . . The admiralty and maritime jurisdiction is essentially a commercial power, and it is necessarily limited to the exercise of that power by Congress."

This view of the power of Congress to legislate in the admiralty area was clearly laid to rest by Mr. Justice Joseph P. Bradley when he recognized the distinction between Commerce Clause power and admiralty in 1875:

> "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Governments. . . ." **Baltimore and Ohio Railroad Co. v. Maryland**, 21 Wall. 456 at 470 (1875).

The **coup de grace** for the concept that Congress has power to legislate in admiralty only through the Commerce power came several years later:

> "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several States, in order to find authority to pass the law in question. The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. . . ." **In Re Garnett**, 141 U.S. 1 at 12 (1891).

C. **The law relied on by the lower court.**

Nothing is absolute and as with every power the limits of the congressional power to legislate in admiralty inevitably needed clarification and delineation. In its Brief of Amicus Curiae, the State of California, at page 4, points out that the court below failed to give a citation of support when it said, ". . . Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. . . ." (A. 40, 41) Support for the statement is found in the vast body of admiralty statutes and regulations as well as in the language of the Supreme Court. "The ship 'from the moment her keel touches the water' becomes 'a subject of admiralty jurisdiction;' . . ." **Detroit Trust Co. v. Steamer "Thomas Barlum"**, 293 U.S. 21 at 48 (1934). A ship bounding on the high seas is clearly and totally immersed in admiralty jurisdiction. Conversely, a ship moored at a dock, a mere stone's throw from a state's jurisdiction, with longshoremen and stevedores going on and off while they unload or load her, is not so clearly within the purview of maritime law. Thus, a line of demarcation must be laid and there must be a means to separate that which is admiralty from that which is not. This is the task the Supreme Court sought to accomplish in its decision in **Southern Pacific Co. v. Jensen**, 244 U.S. 205 (1917).

The fact situation in **Jensen** involved a longshoreman injured while he was unloading a ship engaged in interstate maritime commerce. The injured worker tried to seek workmen's compensation under New York law. In declaring that the injury was within maritime jurisdiction and thus state law could not apply, the Court stated:

> ". . . Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. . . ." (Citations omitted.) 244 U.S. at 215.

The Court found that the work of a stevedore is maritime in nature and within admiralty jurisdiction; therefore, New York could not apply its statute to a stevedore's injury:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . ." 244 U.S. at 217.

Thus, a majority of the Court felt the line should be drawn with Jensen's injury on the admiralty side.

For the purpose of resolving the case at hand, it is not necessary to trace the battle between state workmen's compensation laws and admiralty jurisdiction. It is

useful, however, to take notice of the judicial language which came forth as this Court struggled to find an adequate test to resolve the issues presented when two jurisdictions are so close and so intertwined.

In the years after **Jensen**, Congress tried to delegate to the states its power to control compensation to injured maritime workmen. This brought the following reaction from the Court:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere." **Knickerbocker Ice Co. v. Stewart**, 253 U.S. 149 at 160 (1920).

Also in **Knickerbocker Ice**, the Court found that Congress could not delegate the power over admiralty entrusted to it by the Constitution.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—it would defeat the very purpose of the grant." (Citation omitted.) 253 U.S. at 164.

In **Knickerbocker Ice**, the Court was confronted with a congressional act allowing states to apply their respective workmen's compensation statutes to injured maritime workmen and, likewise, in **Washington v. Dawson and Co.**, 264 U.S. 219 (1923), at issue was the validity of a congressional attempt to include state workmen's compensation remedies under the "Saving to Suitors" clause. The Court stated:

"Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or

general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left Congress. . . ."

Upon reliance of these decisions, Congress took the suggestion of the **Dawson** Court and in 1927 enacted the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1426-27, 1429, 1431-32, 1434-46 (1929) as amended 33 U.S.C. §§901-50 (1958).

There were lengthly dissents in all these workmen's compensation cases. The main thrust was that the dissenters simply did not believe that the application of workmen's compensation laws to land based workers was a major encroachment upon the admiralty domain. Mr. Justice Brandeis, in his dissent in **Dawson**, provides an example:

". . . How can a law of New York, making a New York employer liable to a New York employee for every occupational injury occurring within the state, mar the proper harmony and uniformity of the assumed general maritime law in its interstate and international relations, when neither a ship nor a shipowner is the employer affected, even though the accident occurs on board a vessel on navigable waters? The relation of the independent contractor to his employee is a matter wholly of state concern. The employer's obligation to pay and the employee's right to receive compensation are not dependent upon any act or omission of the ship or of its owners. To

> impose upon such employer the obligation to make compensation in case of an occupational injury in no way affects the operation of the ship. . . ."

Likewise, the dissenters from the **Jensen** decision, felt that it was inequitable to leave injured workers remediless simply because they were injured in or on a ship which, but for the admiralty jurisdiction, would have been clearly within the states territory. Holmes in his dissent in **Jensen** shows his concern in reference to the place of the injury and the denial of a remedy by the admiralty jurisdiction.

> ". . . The short question is whether the power of the state to regulate the liability in that place and to enforce it in the state's own courts is taken away by the conferring of exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States." Southern Pacific Co. v. Jensen, 244 U.S. at 218, 219.

Further, in the same dissent, Holmes espouses his belief that if Congress is silent, the laws of a state should not leave an injured worker remediless:

> "It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i.e., in the state courts, did not import a like if subordinate power in the states. . . . it is too late to say that the mere silence of Congress excludes the statute or common law of a state from supplementing the wholly inadequate maritime law of the time of

> the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect." (Citations omitted) Southern Pacific Co. v. Jensen, 244 U.S. at 223.

Thus, to some, the law set forth in **Jensen** seemed unfair as applied to the fact situation involved, to-wit: workmen's compensation. In two cases since 1917 the Court has likewise shown a reluctance to apply **Jensen** in such a way as to deny injured parties a remedy under the state law where they would have no comparable remedy under federal admiralty law. In **Just v. Chambers**, 312 U.S. 383 (1940), the Court was faced with either following **Jensen** and withholding from the plaintiffs the survivorship of their claim of personal liability against a deceased ship owner or applying the law of the state of Florida (where the accident occurred) and preserving the plaintiff's claim. Using some language which the Appellant feels tended to limit **Jensen**, the **Just** Court allowed the use of the state law. A similar situation arose in **Standard Dredging Corp. v. Murphy**, 319 U.S. 306 (1943), where the Court allowed the application of a state unemployment insurance tax to maritime employers. Both of these cases, like the dissents in the workmen's compensation cases, are based upon the belief that the state laws involved simply were not a harmful encroachment upon admiralty jurisdiction and laws.

> ". . . The effect on admiralty of an unemplayment insurance program is so markedly different from the effect which it was feared might follow from workmen's compensation legislation that we find no reason to expand the Jensen doctrine into this new area. . . ."

The **Murphy** Court stated the rule given in **Just** and applied it to the Murphy fact situation as follows:

> "Granting that the federal government might choose to operate its own uniform unemployment insurance system for maritime workers if it chose, "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." Just v. Chambers, 312 US 383, 392, 85 L.Ed. 903, 909, 61 S.Ct. 687. When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure. But in dealing with unemployment insurance 'exclusive federal jurisdiction' is not affected at all. Congress retains the power to act in the field, and in the meantime, federal courts have nothing to do with it. No principle of admiralty requires uniformity of State taxation. Taxes on vessels and other business activities of operators have previously been upheld.[7] We hold that nothing in Article 3, §2 of the Constitution places this tax beyond the authority of the State." Standard Dredging Corp. v. Murphy, 319 U.S. at 309, 310.

The **Jensen** decision specifically provided for state action in certain limited instances which might incidentally affect admiralty.

> "In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modi-

> fied, or affected by state legislation. That this may be done to some extent cannot be denied. . . . Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna." Southern Pacific Co. v. Jensen, 244 U.S. at 216.

Thus, the **Jensen** doctrine as interpreted by years of later decision really was not changed drastically. The original decision provided the same tools for finding the applicable law as some later decision chose to emphasize. It should be noted that virtually all of the cases discussed above involved state statutes which were written to operate and did operate mainly in a non-maritime atmosphere. There are thousands of workmen's compensation claims which do not at all involve injuries to maritime workers. The same is true for the application of wrongful death laws, unemployment insurance tax laws, and laws for the survivorship of causes of action. So the problem in **Jensen** and cases which followed it was the

division of powers between state and federal government when the two forces acting in their respective spheres of jurisdiction found themselves each asserting authority over the same segment of a vague border between them and in matters having only non-essential maritime involvements. Congress has eventually acted in such a manner as to define and resolve the various conflicts as it did in the workmen's compensation situation. When new borderline facts arose, the judicial efforts to find a remedy (which took place before the congressional solution was made) often engendered some confusion, but as this Court has recognized, the law found in **Jensen** is still valid.

In **Calbeck v. Travelers Ins. Co.**, 370 U.S. 114 at 130 (1962), this Court quoted with approval the language of Judge Hutcheson of the Fifth Circuit given in **DeBardeleben Coal Corp. v. Henderson**, 142 F.2d 481 (1944):

> "'. . . No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them. . . .'"

Very recent evidence of the vitality of the **Jensen** theory and the Court's understanding of its history is found in **Victory Carriers v. Law**, ____ U.S. ____, 30 L.Ed. 2d 383, 92 S.Ct. ____ (1971). Mr. Justice White recognized the confusion which arose in the efforts to define the seaward limit of a state's power and he discusses in foot-

note No. 7, 30 L.Ed.2d at 389, the evolution of the **Jensen** line. Also in this opinion, Mr. Justice White points out the reliance that Congress made upon **Jensen** when it passed the Longshoremen's and Harbor Workers' Compensation Act, supra. Likewise, in **State Board of Ins. v. Todd Shipyard Corp.**, 370 U.S. 451 at 457 (1962), the Court noted the continued acceptance of **Jensen.**

That the Florida Act deals with an admiralty matter is shown by Florida Statutes 376.021(6), (A 58), stating that the Florida Act supplements the W.Q.L.A. which is in Title 33 (an admiralty section) of the United States Code. Also, Florida's assertion at page 64 of its Brief that the Limitation of Liability Act (which is definitely an admiralty statute) cannot exist together with the Florida Act affirms that Florida acted within the admiralty jurisdiction of the United States. On page 75 the Appellant asserts that Congress did not intend for the W.Q.L.A. to operate in admiralty. 33 U.S.C. 1161(b)(2) proves this wrong by continual referral to other maritime laws.

D. **The law applied to the case at Bar.**

The court below found as fact that the Florida Act sought to deal with maritime matters and on the basis of the law and history stated above, held that the Florida Act was a far greater intrusion into the federal maritime domain than the workmen's compensation law in **Jensen** (A. 44). This holding is substantiated by virtually every facet of the Florida Act.

The State Act is aimed specifically at the shipping industry rather than at local industry. This fact distinguishes it from many of the borderline cases between state and admiralty jurisdiction and puts it squarely in

conflict with the case law above. Florida Statutes 376.07(2)(a) and 376.08(2) directly conflict with the federal maritime law by providing for inspection which, as the Appellant states at page 48 of its Brief, is not new to maritime law. However, this practice in conjunction with a statute aimed specifically at large ocean-going ships, is very new to state law. Likewise, the concept of a state port manager having power to determine unseaworthiness is maritime in nature.

The minimum weather and sea conditions requirements are strictly maritime in nature as are the requirements for equipment and training of the crew. State personnel are commanded to remain independent of but cooperate with (which is a rather vague term) any federal clean-up operations. These federal clean-up operations would be made under the admiralty laws of Congress and thus Florida again intrudes upon maritime law.

The limits of liability established by the Florida Act are greatly different than those established by general maritime law. The defenses provided by the federal maritime law are left to bureaucratic whims in the Florida Act. The state need only plead and prove the fact of the discharge to recover, a procedure which is markedly different from the federal laws. It is to be assumed that the Florida Act is intended to be enforced in Florida's courts and that being the case, Florida has attempted to create admiralty courts in direct contravention of Article III, Section 2 of the United States Constitution.

Article I, Section 8, provides that Congress shall have power "To define and punish piracies and felonies committed on the high seas; and offenses against the law of nations." In the Florida Act (Section 376.12) the master of any vessel (apparently even a vessel not destined to

or leaving from a Florida port) is guilty of a felony if he fails to report a discharge on the high seas but within Florida's waters. Thus, the Florida Act again is in direct conflict with the Constitution.

On page 83 of its brief the Appellant contends that the state act is valid under the "gap theory." As support for this gap theory the State advances **Rodrigue v. Aetna Casualty and Surety Co.**, 395 U.S. 352 (1969) and **Chevron Oil Co. v. Huson,** ___ U.S. ___, 30 L.Ed.2d 296 (1971). Appellant reads these two cases to say that there are gaps in federal and international admiralty law which may be filled by state law. These cases cannot be construed to support this conclusion. Both of these cases were decided under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§1131 et seq. (hereinafter referred to as the "Lands Act"). **Rodrigue** involved suits brought in admiralty by the survivors of workers killed in accidents on oil drilling platforms positioned off the coast of Louisiana. The Court found that in the "Lands Act, Congress intended to treat such structures as artificial islands and thus apply normal federal law supplemented by the law of the adjacent state, rather than treat them as vessels and apply admiralty law. 395 U.S. at 355. Since admiralty law and the Death on the High Seas Act, 46 U.S.C. §§761 et seq., (an admiralty statute) did not apply and federal law did not provide for wrongful death actions, the law of the adjacent state was applied to fill the void in the non-admiralty federal law. The same situation arose in **Huson,** where state law was applied to fill a gap in non-admiralty federal law since admiralty did not apply. However, Admiralty law obviously does apply in the case at bar and the "gap theory" is totally misplaced.

II

CHAPTER 70-224, LAWS OF FLORIDA, IS UNCONSTITUTIONAL AS IT IS IN DIRECT CONFLICT WITH FEDERAL STATUTES IN AN AREA WHICH HAS BEEN PREEMPTED BY FEDERAL STATUTES.

A. The entire body of Federal admiralty law preempts the field.

Recently this Court affirmed an Eighth Circuit Court of Appeals opinion which clearly sets forth the law concerning statutory preemption. In *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 (8 CA, 1971), aff'd ____ U.S. ____, 31 L.Ed.2d 569, 92 S.Ct. __ (1972), the issue resolved was whether the federal government, through the Atomic Energy Commission (AEC), had exclusive authority to regulate the radioactive waste releases from nuclear power plants so as to preclude state regulation of same releases. The power company was issued a provisional permit by the AEC for the construction of a nuclear power plant near Monticello, Minnesota. The power plant met all federal requirements but the state of Minnesota imposed a more stringent set of requirements which covered the same areas as the federal regulations. To defend its authority to make such regulation, Minnesota made three major contentions: (1) regulation of such radioactive waste is within the Article X police power of the states; (2) the federal legislation creating the AEC does not expressly or impliedly preempt the power of a state to make such regulations; and (3) even if there is a preemption of the field by Congress, a state can still make concomitant regulation.

As a basis for denying all three of these contentions, the court in **Northern States Power** gave the following statement of law:

> "The doctrine of federal pre-emption has its roots in Article VI, Clause 2 of the United States Constitution, the 'Supremacy Clause,' which elevates federal law above that of the States. It provides:
>
> > 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'
>
> On the other hand, under the Tenth Amendment to the Constitution '(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, are reserved to the States respectively, or to the people.'
>
> (1) Thus, in the approach to any inquiry into federal preemption, it must be initially determined that Congressional action establishing federal regulation in a particular field has been undertaken pursuant to one of the powers delegated to the United States by the Constitution. . . .

Once it is ascertained that the federal government possesses the power to regulate in a given area, the question is whether Congress has exercised its power of legislation in such a manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter.

(2) First, as the Supreme Court noted in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132;

> (a) holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility * * *' ...

(3) Second, absent inevitable collision between the two schemes of regulation it must be determined whether Congress manifested an intent to displace coincident state regulation in a given area. Where Congress has unequivocally and expressly declared that the authority conferred by it shall be exclusive, then there is no doubt but that states cannot exert concomitant or supplementary regulatory authority over the identical activity....

(4, 5) Third, even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal pre-emption may be implied.... Key factors in the determination of whether Congress has, by

implication, pre-erpted a particular area so as to preclude state stempts at dual regulation include, *inter alia:* () the aim and intent of Congress as revealed by the statute itself and its legislative histry, Florida Lime & Avocado Growers, Inc. supr (2) the pervasiveness of the federal regulatoryscheme as authorized and directed by the legisltion and as carried into effect by the federal admnistrative agency.... (3) the nature of the sυject matter regulated and whether it is one 'hich demands 'exclusive federal regulation inorder to achieve uniformity vital to national irerest. "...and ultimately (4) 'whether, under tε circumstances of (a) particular case (state law stands as an obstacle to the accomplishmen and execution of the full purposes and objective of Congress.' ..." (citations omitted) *Northern States Power Co. v. Minnesota*, 447 F.2d 113 at 1145-1147.

Using this clear sttement of the federal law of statutory preemption in th present case, the first issue is whether Congress actecwithin its constitutional limits in enacting the Water Qality Improvement Act of 1970, Pub. L. 91-224, 33 U.S.C. §1161, et seq.; the Limitation of Liability Act, Chapter 13, Sec. 3, 9 Stat. 635 (March 3, 1851), amended and coified 46 U.S.C. §183 (1964); The Extension of AdmiraltyAct, 62 Stat. 496 (June 19, 1948), 46 U.S.C. 740; and theFederal Wreck Statute, 33 U.S.C. §§409, 414, 419. Since he coverage of these acts extends over admiralty as well s interstate and foreign commerce, there can be no doubt that Congress had constitutional justification for its actins. At no point does the Appellant contest the basis for thse acts.

Next, it must be decided whether compliance with both federal and state regulations is a physical impossibility. The rule in this area of preemption as stated in *Northern States Power* comes from *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, at 142-143 (1963).

In *Northern States Power*, the court found there was no impossibility of dual compliance because the Minnesota regulations were more stringent than the federal regulation so compliance with the state regulations insured compliance with both. In the case at bar, the federal government, pursuant to the various federal statutes, has put into effect a vast body of rules and regulations to accomplish the statutory purpose.

Florida, on the other hand, has not yet promulgated a comprehensive body of regulations for the enforcement of its act. (See State of Florida, Department of Natural Resources, Division of Marine Resources, Regulations, Chapter 16B — 16.08, A 73-75.) It is difficult to conceive that Florida could draft an independent set of regulations that would not conflict with the Federal regulations to the point of creating a physical impossibility of dual compliance. The Court has taken cognizance of like situations in the past. See *Bethlehem Steel Co. v. New York Labor Rel. Board*, 330 U.S. 767 at 774 (1947). The meaning of the words "physical impossibility" is crucial in testing the Florida Act under this rule. Assuming that the phrase simply means that a diligent, good faith effort to comply with both laws is certain to fail, then the Florida Act must fall by this test. As can be seen by the finding of fact upon which District Court Judge Charles R. Scott based his temporary restraining order in the proceedings below, shippers who were in compliance with the Federal Act found it impossible to comply with the State Act.

"4. That substantial injury, loss, or damage has already been suffered by some of said shipowners or operators and others whose businesses are related thereto or dependent thereon and that irreparable injury, loss, or damage will be suffered by said persons or entities unless a temporary restraining order is issued against said defendants, in that vessels or barges carrying oil, gasoline, or other hazardous substances are prohibited from using any Florida port on or after March 15, 1971, unless their owners or operators comply with the evidence of financial responsibility requirements of the State law and rule promulgated thereunder, which requirements cannot be met without subjecting said owners or operators to the grave risk of unlimited strict liability; that said owners or operators being unable to obtain insurance against unlimited strict liability to achieve compliance are subject to civil penalties up to $50,000 per day for not being in compliance or for violation of any other section of said statute or any rule or regulation of the defendants; that said owners or operators being unable to obtain insurance against unlimited strict liability will be seriously restricted in the ability to obtain or maintain financing and to otherwise operate and maintain their businesses on a viable and stable basis; that those whose businesses are related to or dependent on shipping will be materially affected by loss of revenue, inability to obtain fuel and supplies, and the inability to market finished products a result of the inability of ships and other carriers to enter the Port of Jacksonville and other ports of

> Florida; and it appearing to the Court that neither Chapter 376 nor the general law of Florida permits any right of recovery against the State for any such damages; all as appearing from the complaint, statutes, exhibits, and the following evidence submitted to this Court, to wit:
>
> '(a) The testimony of the witnesses, H. G. Williams, Edwin Belcher, III, and John Connolly, Jr., that shipowners and operators have been unable to obtain insurance against unlimited strict liability with direct action against the insurer in order to comply with the Florida requirements;' "
>
> * * *
>
> Temporary Restraining Order signed March 19, *nunc pro tunc* March 12, 1971, AWO, et al. v. Askew, et al.

Thus, by the rule concerning impossibility of dual compliance, the Florida Act must fall and no inquiry into congressional intent is required.

A second major rule of preemption found in *Northern States Power* requires a determination as to whether Congress manifested an intent to displace coincident state regulations in a given area. While 33 U.S.C. §1161(o) could be construed to reflect a congressional intent that the W.Q.I.A. would not itself preclude non-conflicting state regulations, this section specifically maintains the vitality of the other admiralty provisions enacted by Congress pursuant to Article III, Section 2 and the Supremacy Clause.

> (o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

Thus, the preemptive effect of the various admiralty laws which could have overruled the State Act before the W.Q.I.A. can still do so afterwards. Likewise, to be constitutional, the State Act must not be incompatible with the entire body of judicial opinion that govern the admiralty field.

> "... this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. (Citations omitted). *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 at 314 (1955).

The Appellant in Point I(F) of its Brief recognizes the preemptive effect of the Limitation of Liability Act, 9 Stat. 635, 46 U.S.C. §§181-189. Stated with candor: "The Limited Liability Act cannot co-exist in the same courtroom with the Florida act." This only leaves the issue of the constitutionality of the Limited Liability Act. This Act was passed in 1851 and since that time it has been used repeatedly and has been a cornerstone of the admiralty law of this nation as well as many other seafaring

nations. Vast amounts of legislation have been passed depending upon its existence. The Supreme Court has promulgated Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims to insure the orderly application of the Limited Liability Act. The immense importance of the Act can be gleaned by reading Chapter 10 of Gilmore and Black, *The Law of Admiralty* (1957), the entire chapter being devoted to this one Act. The same is true of Chapter 10 of Baer, *Admiralty Law and The Supreme Court* (1969).

Aside from the test of time and usage, the Limitation of Liability Act is constitutional because this Court has said that it is:

> "In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of its administer it in a spirit of fairness, with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations as before stated, will be of the last importance; but if is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not

entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

* * *

"We have no doubt that Congress had power to pass the law. It is not only a maritime regulation in its character, but it is clearly within the scope of the power given to Congress 'to regulate commerce.' In the case of *The Lottawanna*, 21 Wall., 558 [88 U.S., XXII., 654] speaking of the power to make changes in the maritime law of the country, we said: 'Congress undoubtedly has authority under the commercial power, it no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true: but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship-owners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime . . . ."

"It need not be added that if Congress had power to pass the Act of 1851 [9 Stat. at L.,635], it is binding on all courts and jurisdictions throughout the United States."

"We have said that, by the provisions of the Act, the scheme was sketched in outline. A reference to

> its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted in operation in England and in some of the States. It laid down a few general principles and propositions and left it to the courts to enforce them and carry them into practical effect."

Providence and New York Steamship Co. v. Hill Mfg. Co., 109 U.S. 578, 27 L. Ed. 1038 at 1042, 1043 (1883). The Act being a mere outline, it was left to the Supreme Court to apply its provision in a fair and reasonable manner. Starting from *Norwich and New York Transportation Co. v. Wright*, 13 Wall. 104 (1871) up until the present, the Supreme Court has fashioned rules and judicial opinions to meet this task. See Gilmore and Black, *Law of Admiralty* (1957), pp. 663-667. Thus, the Act being constitutionally sound in its origin, it is inconceivable that under the hegemony of the nation's high court the Act could be unconstitutional for lack of procedural due process as the state alleges. Today's limitation proceeding is based on "the 1851 Act and this Court's rules...." *British Transport Company v. United States*, 354 U.S. 129 at 134, 135 (1957). The Limitation of Liability Act was noted without question as being vital and still in force in *Wyandotte Trans. Co. v. United States*, 389 U.S. 191 at 205, 206 (1967).

The Appellant argues that the Limited Liability Act has been changed by the W.Q.I.A. This is not a certainty because the same type argument was put forth in *Wyandotte* in reference to the Rivers and Harbors Act of 1899

and the Limited Liability Act and it was held that the Limited Liability Act was unchanged. Furthermore even if the W.Q.I.A. does change the Limited Liability Act, it does so only in relation to governmental cleanup cost. Any change is negated when viewed further in the light of 33 U.S.C. §1161(o)(1) and the fact that the W.Q.I.A. is geared to gain recoveries from insurance and the assets tendered as proof of financial responsibility rather than the ship or its remains.

It should also be observed that to declare the Limitation of Liability Act unconstitutional would be to make American admiralty law very much incompatible with the international law of the seas. See footnote No. 5 on pages 231 and 232 and Appendix D of Baer, **Admiralty Law and the Supreme Court** (1969).

In Section I(D) of its Brief, the Appellant seeks to have the Admiralty Extension Act of 1948, 62 Stat. 496 (June 19, 1948), 46 U.S.C. §740 (A. 93) declared unconstitutional. On page 51 of the Appellant's Brief, the attack begins with a quote from Mr. Justice Story which later was changed by the judicial extension of admiralty to the non-tidal navigable waters found in **The Genesee Chief v. Fitzhugh**, 12 How. 443 (1851). Next, a quote from Justice Johnson's concurring opinion in **Ramsay v. Allegre**, 12 Wheat. 611 (1827), in which opinion Johnson is the champion of the cause to have American admiralty law be a frozen mirror image of the English admiralty law by ". . . fixing the period of the revolution for the law of the jurisdiction of the admiralty." 12 Wheat. at 638. This view of Johnson's was destroyed in **Waring v. Clarke**, 5 How. 441 at 457 (1847).

"But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of 'all cases of admiralty and maritime jurisdiction,' as it is expressed in the Constitution, to the cases of admiralty and maritime jurisdiction in England when our Constitution was adopted. To do so would make the latter a part and parcel of the Constitution—as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the Constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England—a limitation which never could have been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States 'to all cases of admiralty and maritime jurisdiction.' . . ."

The Court in **O'Donnell v. Great Lakes Dredge & Dock Co.**, 318 U.S. at 40 (1943) recognized the power of Congress to change admiralty rules as experience or changing conditions required. Since there is no constitutional bar and since the "Savings to Suitors Clause" in 28 U.S.C. 1333 is merely a congressional act, the door is open for necessary changes to be made. This is exactly what Congress did in passing the Admiralty Extension Act. See **Victory Carriers v. Law**, 30 L.Ed.2d 383 at 389, 390, footnote No. 8.

The Admiralty Extension Act was upheld in lower courts (see **United States v. Matson Navigation Co.**, 201 F.2d 610, 614-616 (CA 9 1953); **American Bridge Co. v. The Gloria O**, 98 F.Supp. 71, 73-74 (ED NY 1951); **Fematt v. City of Los Angeles**, 196 F.Supp. 89, 93 (SD Cal 1961)), and accepted as constitutional in **Gutierrez v. Waterman Steamship Corp.**, 373 U.S. 206 at 372, 373 (1963):

> "Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat 496, 46 USC §740, swept it away when it made vessels on navigable water liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land.' . . . We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 USC §740 when, as here, it is alleged that the shipowner commits a tort' while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act."

Likewise, the Act was accepted and discussed in **Wacirema Operating Co. v. Johnson**, 396 U.S. 212 at 221-223 (1969). Also **Rodrigue v. Aetna Casualty and Surety Co.**, 395 U.S. 352 at 360 (1969), ". . . But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event." The Act is also upheld

by the majority in **Victory Carriers**, supra, 30 L.Ed.2d at 390, 391, and by Mr. Justice Douglas (Brennan concurring) in dissent, 30 L.Ed.2d 397, 398. Thus the Admiralty Extension Act is constitutional and in present use. Acts limiting liability of ship owners were an accepted part of the maritime law adopted by this country at the time of the constitutional convention, thus it would be hard to conceive that this concept is repugnant to the constitutional criteria for due process.

The Florida Act is not limited to recovery for sea to shore torts. A recovery is purportedly authorized thereunder for the clean-up cost of an oil slick which never even touched shore. Thus, the Limited Liability Act would easily find itself being confronted by a conflicting state statute in its traditional domain. 46 U.S.C. §740 (1948). Admiralty jurisdiction covers suits for damages on land caused by an oil spill started at sea. See **Petition of New Jersey Barging Corp.**, 168 F.Supp. 925 (1958). If the spill only causes damage to the water and does not come ashore, then admiralty jurisdiction still prevails, but not by virtue of 46 U.S.C. §740. **California v. S. S. Bournemouth**, 307 F.Supp. 922 (DC, 1969) and 318 F.Supp. 839, 10 A.L.R.Fed. 950 (1970). Likewise, the Florida Act conflicts with and is preempted by the Federal Wreck Statute, 33 U.S.C., Sections 409, 414, 419, which provides that the owner of a vessel which has been sunk in navigable waters may relieve himself of responsibility by abandoning the wreck to the Government unless the vessel was sunk as a result of negligence, in which event the owner may be held liable for removal costs. **Wyandotte Transportation Co. v. United States**, 389 U.S. 191 (1967). Section 376.15 of the Florida Act, together with Section 376.16, is in direct conflict with the Federal Wreck Statute. Section 376.15 provides:

"(1) It is unlawful for any person, firm, or corporation to store or leave any vessel in a wrecked, junked, or substantially dismantled condition or abandoned upon any public waters or at any port in this state without the consent of the agency having jurisdiction thereof or docked at any private property without the consent of the owner of the private property."

Section 376.16 of the Florida Act is the enforcement provision for any violation of Chapter 376 and provides:

"(1) It is unlawful for any person to violate any provision of this chapter or any rule, regulation, or order of the department made hereunder. Violations shall be punishable by a civil penalty of up to fifty thousand dollars to be assessed by the department. Each day during any portion of which the violation occurs constitutes a separate offense."

Sections 376.15 and 376.16, when read together, clearly contravene the Federal Wreck Statute.

Two further tests of preemption are set forth in **Northern States Power**, supra. One deals with the pervasiveness of the federal regulatory scheme. The other hinges on whether the subject matter is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interest." **Florida Lime and Avocado Growers, Inc. v. Paul**, 373 U.S. at 143-144.

Florida Lime and Avocado Growers also provides the following rule:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence in the field, not whether they are aimed at similar or different objectives." 373 U.S. at 142.

The Court next states that preemption may be found **either** when the nature of the subject matter permits no other conclusion **or** when Congress unmistakably so ordains. (The disjunctive nature of this sentence is emphasized.) The subject matter of the Florida Statute is the application of unlimited strict liability for oil spills. This is definitely a subject matter which lies within the domain of admiralty law. **Petition of New Jersey Barging Corp.**, 168 F.Supp. 925 (1958). There can be no doubt that admiralty law and the regulation of ships, their equipment, operation, and the liabilities which they are subject to, are so totally inter-mixed with interstate and international maritime commerce that uniformity is a necessity. This was accepted by those drafting the Constitution. Likewise, this Court has recognized the need for uniformity through the years:

> "One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a com-

> mercial character affecting the intercourse of the States with each other or with foreign States." **The Lottawanna,** 21 Wall. 558, 22 L.ed. 654 at 662 (1875).

It is equally well accepted that state laws give way when they contravene the required uniformity.

> ". . . It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. . . ." (Citations omitted.) **Romero v. International Terminal Operating Co.,** 358 U.S. 354 at 373 (1959).

The finding of fact in the Court below in the case sub judice recognizes that the Florida Act not only makes inroads into the uniformity of admiralty law, but also seeks to change it.

> "That the Florida Act constitutes unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. . . ." (A. 2)

It is to be noted that if the nature of the subject matter requires uniformity, Congressional intent need not be examined.

The Appellants seek to make much of the words of §1161(o)(2) of the Federal Act, "Nothing in this section shall be construed as preempting any state or political

subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such state." It should be emphasized that this is not an affirmative grant of power to the states to legislate in the area of concern. Rather, this section simply provides that nothing in this section of the W.Q.I.A. will prevent non-conflicting state action in the area. The Admiralty Extension Act, the Limitation of Liability, the Federal Wreck Statute, and the whole body of admiralty law otherwise are not sought to be submerged to state authority under the literal application of this section, and continue to be barriers to state legislation relating to oil spills. §§1161(o)(1), (2) and (3) show the congressional intention that states may legislate only if their laws do not conflict with the W.Q.I.A., the admiralty laws of this nation, and, of course, as the lower court pointed out, with the Constitution as interpreted by our nation's judiciary. Also, §1161(o)(3) shows a congressional intention that a mere conflict between a state statute and the W.Q.I.A. rather than an impossibility of dual compliance is all that is necessary to revive the preemption waived in §1161(o)(2).

While conceivably the Florida statute may be similar to the Minnesota regulations found in **Northern States Power** in that it is a more stringent requirement than the federal statute but creates no physical impossibility of dual compliance, this similarity is lost because, unlike the Minnesota regulations, the Florida statute vests power in an administrative agency to promulgate rules and regulations which might contradict the federal statute or the rules and regulations created by the Coast Guard and the President as provided in §1161 of the W.Q.I.A.

It is obvious that a comprehensive federal administrative procedure for enforcing the W.Q.I.A. cannot help but be in conflict with almost any state police action or administrative procedure. This is especially true since the United States has such a comprehensive procedure in the Coast Guard regulations and the executive orders:

> ". . . But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency." **Bethlehem Steel Co. v. New York Labor Relations Board,** 330 U.S. 767 at 774 (1947).

B. **Police power is not applicable.**

The State, in its Brief, relies heavily on the argument that it is acting within its police power by passing the State Act. The police power has no singular source from which it springs, and there have been many divergent attempts to define it. See 16 Am.Jur.2d Constitutional Law §§259-262. Due to the vague and general nature of the police power, it must give way to specific constitutional grants. In **Cooley v. Board of Wardens of Port of Philadelphia,** 12 How. 299, 12 L.Ed. 996 at 1005 (1851), the Court decided that the grant of commerce power to Congress was not by itself exclusive, but when Congress has acted, the police power of the states is subject to these actions by virtue of the Supremacy Clause. **Cooley** makes it very clear that if the Constitution does give an exclusive grant of legislative power, as this Court has ruled that it does

in admiralty, then Congress cannot re-grant the power to the states and the states cannot act within the excluded area. 12 How. at 318.

Appellant puts much faith in the law found in **Huron Portland Cement Co. v. Detroit,** 362 U.S. 440 (1960). There are many reasons why this case does not apply. First, the Smoke Abatement Code of Detroit was a law which operated almost totally on land but did have some incidental effect on ships within the city. The Florida Act is aimed specifically at the maritime shipping industry and its operation on the open oceans and harbors. The issues in **Huron** were strictly framed under the Commerce Clause which (unlike admiralty) is not exclusively a federal domain. In addition to finding no constitutional preemption, the Court found as fact that the Detroit law dealt with an area not covered by any congressional or federal regulation.

In the present case there is a comprehensive congressional act and federal regulatory scheme specifically covering the same subject matter over which Florida seeks to assert its police power. It should be noted, too, that the Detroit law (when applied to ships at all) dealt with only one facet of one part of a ship, to-wit, the amount of smoke coming from the boiler. The Florida Act deals with equipment required to be on board, training of the crew, the financial responsibility, the conditions under which entry and unloading may occur and numerous other facets of a ship's existence and functioning. When a smoking ship is docked in a crowded city on a narrow river, and no federal remedy is available, the limited regulation of that ship by a local government to avoid the local injury is one thing. But the situation is entirely different when

the police power is invoked to sustain a statute aimed exclusively at the shipping industry where the only local concern is manifested in the phrase "destined for or leaving a Florida port." The Appellant comes nowhere near falling within the boundaries of the **Huron** case.

On page 45 of its Brief, Appellant states the rule that "The Congressional Act must specifically exclude state legislation . . ." This statement is not supported by **Northern States Power Company v. Minnesota,** 447 F.2d 1143 (8 CA, 1971), aff'd 31 L.Ed.2d 576 (1972), in which Minnesota asserted its police power in an effort to regulate atomic waste the Court found that Congress had preempted the area by implication, 447 F.2d at 1153. **Northern States Power** indicates that the status of the police power of a state is not made sacred by the alleged intention to regulate water pollution. This is especially true where Congress has already acted to meet the same end. The Court in **Northern States Power** found that when it chooses to act as such, Congress is the supreme authority to balance industrial progress and adequate safety standards:

> ". . . Thus, through direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety s t a n d a r d s. Only through the application and enforcement of uniform standards promulgated by a national agency will these dual objectives be assured. Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceiv-

> ably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power." **Northern States Power Co. v. Minnesota**, 447 F.2d at 1153, 1154 (1971).

The proper balance between commercial growth and protection of the environment is especially necessary in the situation of the American Merchant Marine. The present national administration has started a new program to revitalize the American merchant fleet which has slipped from number one in the world in 1945 to a third-rate power carrying less than 5 percent of American cargo moving in foreign commerce. The plans call for 300 new ships in ten years, the oil tankers being in the majority. The contracts awarded to date total 1.1 billion dollars and include the cost of government subsidies to offset the difference between construction costs in the United States and foreign shipyards.

The push by government to build a strong, needed, maritime service, is a responsibility no state or combination of states can meet. It must be a federal function to supply this national need. It is no less a federal function to supervise, police, and protect this industry. To have fifty states acting each in its own separate way, at best would produce chaos, at worst destruction.

III

CHAPTER 70-224, LAWS OF FLORIDA, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AS THE POWER OF CONGRESS TO REGULATE FOREIGN AND INTERSTATE COMMERCE IS SUPREME.

The regulation of foreign and interstate commerce is an area peculiarly limited to the federal government. Any industry as deeply involved in foreign and interstate commerce as the shipping industry is one which must function under a set of standards and regulations which are consistent and uniform throughout the nation; state regulation in this area is inconsistent with the concept of orderly operation and the free flow of such commerce; **Gibbons v. Ogden**, 9 Wheat. 1 (1824); **Norris v. City of Boston**, 7 How. 283 (1849); **The Daniel Ball**, 10 Wall. 557 (1870); **Lord v. Goodall, Nelson & Perkins Steamship Co.**, 12 Otto 541 (1880); **Hall v. DeCuir**, 5 Otto 485 (1877).

The necessity for regulation on a nation-wide scale is traced to the birth of the United States Government through congressional legislation and Supreme Court case law: 1 Stat. 55, 131; 5 Stat. 304; **Gibbons v. Ogden**, supra; Veazie v. **Moor**, 14 How. 568 (1852); **The Genesee Chief**, 12 How. 443 (1851); **The Daniel Ball**, supra.

Article I, Section 8, Clause 3, specifically provides the Congress shall have power "To regulate commerce with foreign nations, . . ." and grants to the federal government that regulatory power. This clause has been interpreted throughout the history of the Nation as a grant

of supreme regulatory power under which Congress precludes state action. The Supreme Court of the United States has consistently placed the power to regulate commerce on the navigable waters which touches foreign commerce as an area of federal control; **Gilman v. Philadelphia**, 3 Wall. 724 (1865):

> ". . . The power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie." **Gilman v. Philadelphia**, 3 Wall. 724.

In 1875, the Supreme Court, in voiding a New York statute attempting to regulate foreign commerce observed:

> ". . . A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations must of necessity be national in its character . . . It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments." **Henderson v. New York (Henderson v. Wickham)** 92 U.S. 259, 274 (1876).

The case of **Lord v. Goodall, Nelson & Perkins Steamship Co.**, 12 Otto 541 (1880), treats the question of control of foreign commerce. The issue in **Lord** was whether the United States Congress could pass legislation regulating the liability of a vessel owner for cargo and passengers traveling on the high seas and within navigable waters

of the United States but engaged in maritime commerce only between ports of the same state. The court held that Congress had the power to regulate foreign commerce if the vessel traveled on the high seas:

> "Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the Nation as a nation in its external affairs. It must, therefore, be subject to the national government.
>
> "The contracts sued on do not relate to the purely internal commerce of a State, but, impliedly at least, connect themselves with the commerce of the world, because in their performance the laws of Nations on the high seas may become involved, and the United States compelled to respond." **Lord v. Goodall, Nelson & Perkins Steamship Co.**, 12 Otto 541, 544.

In **Veazie v. Moor**, 14 How. 568 (1852), the Court, through Mr. Justice Daniels, stated:

> "Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extra territorial." 14 How. 568, 573.

Thus, vessels which transport cargo on the high seas come within the scope of the foreign commerce power. Appellees' vessels in the case at bar fall within the classi-

fication of being engaged in foreign commerce as developed in the cases dealing with foreign commerce. That they move in foreign commerce both between nations of the world and as vessels on the high seas comingled with other vessels is clear. The necessity to be regulated evenly must be fostered and directed by the Federal Government such that the need for uniformity will be promoted. The specific grant in the Constitution "to regulate commerce with foreign nations" was interpreted in **Board of Trustees of the University of Illinois v. The United States of America,** 289 U.S. 48 at 56, 57 (1923) as follows:

> "The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend.' **Gibbons v. Ogden,** 9 Wheat 1, 193; 6 L.Ed. 23, 69. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action."

In considering the Florida Act in the context of the pronouncements of the Supreme Court of the United States relative to the regulation of foreign commerce, state authority to impede, to any extent, foreign commerce is prohibited. The Appellees in the case at bar participate in foreign commerce and they and others similarly situated are in the dilemma of subjecting their total assets to unlimited liability if they suffer a catastrophe while engaged in maritime oil transportation in the waters of the State of Florida. See F.S. 376.12. Thus, to avoid the possibility of material financial destruction or impairment

because of the provisions of the Florida Act, their only reasonable option is to halt maritime commerce in Florida ports.

The Florida Act contains a number of provisions directly attempting to control areas of foreign commerce already subject to federal laws and regulations. The promulgation of operating and inspection requirements (F.S. 376.07(2)(a)) directly affect foreign commerce. Also, the statute specifically requires that all "vessels transporting pollutants within the State waters shall maintain on board such containment gear as may be required by the Department . . ." (F.S. 376.07(2)(a)). These provisions are unquestionably attempts by the State of Florida to regulate foreign commerce. When the Florida Act is considered as a whole with all its provisions, it directly intrudes into the area in which the Constitution so wisely provided for Congress to legislate, that is "regulation of foreign commerce" and, thus, the Florida Act is unconstitutional as a direct intrusion into the powers granted solely to Congress by Article I, Section 8, Clause 3.

A. The Florida Act violates the Commerce Clause of the United States Constitution as it imposes an undue burden on interstate and foreign commerce.

That a state may regulate certain areas which are within the concept of interstate commerce is without question; but a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary; **Hall v. DeCuir**, 5 How. 485; **Southern Pacific v. Arizona**, 325 U.S. 761 (1945); **Bibb v. Navajo Freight Lines**, 359 U.S. 530 (1959).

The areas in which a state may exercise concurrent jurisdiction have been classified consistently as areas of commerce of a local character; **Cooley v. Board of Wardens**, 12 How. 299, 319 (1851); **California v. Thompson**, 313 U.S. 109 (1940); **South Carolina Highway Dept. v. Barnwell Bros.**, 303 U.S. 177 (1938); **Parker v. Brown**, 317 U.S. 341 (1942); **Toomer v. Witsell**, 334 U.S. 385 (1948); **Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R.**, 393 U.S. 192 (1968).

The current definition of "local" may be gleaned from the recent Supreme Court of the United States decisions of **South Carolina Highway Dept. v. Barnwell Bros.**, supra, **Huron Portland Cement v. Detroit**, 362 U.S. 40, 41 (1960), and **Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R., supra.** In **South Carolina State Highway Dept. v. Barnwell Bros.**, supra, railroads were denoted as an area in which the commerce clause dominated, 303 U.S. 182, 186. The Court further stated that few subjects of state regulation were so peculiarly of local concern as the use of state highways. The Court noted in footnote 5, at page 303, U.S. 187, the following acceptable areas of state regulation:

> "Among the state regulations materially affecting interstate commerce which this court has upheld, **Congress not acting**, are those which sanction obstructions in navigable rivers . . . approve the erection of bridges over navigable streams . . . control the location of docks . . . impose wharfage charges . . . and establish inspection and quarantine laws. . . ."

Each of these acceptable areas of state regulation does not operate to regulate outside the geographic boundaries of the jurisdiction. This particular fact is noted as one of the elements which the court considered in upholding the "full crew" laws in **Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R.**, 393 U.S. 192 (1968).

The record in the case at bar reveals the inability of vessels to obtain insurance because of the Florida Act. As a result, operators of vessels are to be forced to subject their total assets to unlimited strict liability; or to the more reasonable alternative, to forego operating within the waters and ports of Florida. This is not the effect of a regulation which is solely of a "local" character, but obviously materially affects interstate maritime commerce.

The Supreme Court has enunciated a concise standard to apply when considering the validity of a state statute in relation to the commerce clause of the United States Constitution in **Pike v. Bruce Church, Inc.**, 397 U.S. 137 (1970), at page 178 as follows:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: **Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly execessive in relation to the putative local benefits.**" (Emphasis supplied)

The Florida Act deals with maritime commerce, which is certainly interstate maritime commerce; and, thus, applying the **Pike** standard, the issue is whether the state statute affects interstate maritime commerce unconstitutionally.

Under the **Pike** standard, the following factors should be considered:

(1) Does the Florida Act regulate evenhandedly to effectuate a legitimate local interest?

(2) Are the effects of the Florida Act only incidental on interstate commerce?

Assuming the answers to questions (1) and (2) are in the affirmative, then:

(3) Is the burden imposed on interstate commerce excessive in relation to the putative local benefits?

Placing the Florida Act into this context, the following analysis is developed:

(1) The Florida Act does not regulate evenhandedly to effect a legitimate local purpose. The Act has developed a system whereby vessels which enter Florida waters, but do not touch Florida ports, are not required to comply with the financial responsibility laws or its operational procedures and containment gear regulations while vessels "using any port in Florida" (F.S. 376.14) or "destined for or leaving a licensee's terminal facility" (F.S. 376.12) are required to comply. The statute does not evenhandedly regulate, but discriminates, and does not provide for the

enforcement of the preventive and protective regulations to a segment of transient oil-carrying vessels using State waters which did not put in at Florida ports, but merely use her waterways.

(2) Whether the effect of the State Act on interstate commerce is only incidental must be measured by the chain reaction of consequences which occur due to enforcement. The Florida Act provides for substantive State remedies in controlling vessels entering State waters. These vessels are traveling in foreign and interstate maritime commerce subject to a uniform set of regulations promulgated by the Federal Government. The creation of State substantive remedies which burdens a vessel with liability (F.S. 376.021 (5); F.S. 376.12; F.S. 376.14), beyond that imposed by the Federal Government (46 U.S.C. Subsections 181-189; 33 U.S.C. 1161 (g)), is the initial factor in development of a variety of elements which culminate in the Florida Act having a major effect on interstate maritime commerce.

That vessel owners will operate in the State waters without insurance to protect themselves from financial destruction in the event of an unfortunate catastrophe due to the unlimited strict liability imposed by the Florida Act is beyond the comprehension of sound economic judgment. Yet Florida has enacted a statute which provides not only for unlimited strict liability for clean-up costs, but also the same type of liability for environmental damage and third-party damage upon the vessel and the owners thereof (F.S. 376.11; F.S. 376.12). The State statute does not lay its foundations in a rational approach to tort liability. Strict liability, as applied in the law of torts, means that a person is liable although he has taken every precaution and is not at fault in any moral or social sense.

"But such extended responsibility may undoubtedly impose too heavy a burden upon the defendant. It is one thing to say that a dangerous enterprise must pay its way within reasonable limits, and quite another to say that it must bear responsibility for every extreme of harm that it may cause. The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of 'proximate cause' in negligence cases, demands here that some limit be set...." **Prosser, Torts,** 533 (3d ed. 1964).

In strict liability cases, the liability is limited to those injuries which are the materialization of the specific extra hazard knowingly created by the voluntary acts of the defendant, as well as to foreseeable plaintiffs, but liability is held not to extend to those situations in which an unforeseeable natural event (act of God) intervenes, or in which the unforeseeable act of the plaintiff or a third person is responsible for the harm. **Prosser, Torts,** Section 78 (3d ed. 1964).

The federal government has recognized in the Federal Water Quality Improvement Act of 1970 the uniqueness of the oil pollution field and has placed a cap on the ultimate responsibility of vessels and vessel owners to that of clean-up cost of $100 per gross ton or 14 million dollars, whichever is lesser; 33 U.S.C. 1161(p). The field of oil pollution contains innumerable diverse factors such that each act is unique in occurrence and lacking in any means of estimate. Thus, if vessels and vessel owners are burdened with "unlimited strict liability," they must assume the worst possible combination of occurrences and conditions, and base the economic responsibility upon those considerations.

As was determined in the hearings on the Federal Water Quality Improvement Act, as noted on page 39 of the Appellant's Brief, there was found to be a limit to which marine insurance could rationally and economically insure vessels as to oil pollution.

Thus, the Florida Act places the appellees on the "horns of a dilemma": Either continue with their contracts which have been established and enter Florida waters subjecting their vessels and assets to unlimited strict liability and, in case of accident, financial destruction or impairment; or halt marine oil transportation in Florida. Either of these alternatives has a major effect on interstate commerce.

(3) The final question is whether the burden imposed on interstate commerce is excessive in relation to its claimed local benefits. The Supreme Court of the United States, in **Pike v. Bruce Church, Inc.**, 398 U.S. 137 at 142 (1970), approached this question as follows:

> "... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities...."

The concern of the State of Florida to protect its marine environmental resources both for their inherent aesthetic value and for their economic value is of the highest priority. The question is whether the State of Florida may directly preclude vessels from entering its waters; or, in the alternative, force vessel owners to play

roulette in gambling that their vessel would not be the one unfortunate enough to be the subject of an oil pollution catastrophe which would deplete or impair their resources, the risk of which is for vessel owners to operate in Florida. This burden, coupled with requirements for operating and inspection of vessels (F.S. 376.07(2)(a)), the requirement of carrying containment gear (F.S. 376.07(2)(a)), and the requirement to post evidence of financial responsibility in addition to that required by the Federal oil spill legislation create an excessive burden on interstate commerce. The Florida Act is an undue burden on interstate maritime commerce, as the prevention of pollution and clean-up of pollution may be more effectively enforced with less burden on interstate commerce; and the Florida Act is, therefore, unconstitutional as a direct conflict with the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution.

B. The Florida Act violates the Commerce Clause of the United States Constitution as the Florida Act relates to a "national" problem requiring uniformity.

The grant of power to Congress in Article I, Section 8, Clause 3, of the United States Constitution, "To regulate commerce . . . among the several states" is plenary; **Gibbons v. Ogden,** 9 Wheat. 1 (1824). The extent to which a state may promulgate laws which affect interstate commerce has been the subject of vast litigation; **Norris v. City of Boston,** 7 How. 282; Minnesota Rate Cases (**Simpson v. Shepherd**), 230 U.S. 352, 399 (1912); **South Carolina Highway Department v. Barnwell Bros.,** 303 U.S. 177 (1938); **Huron Portland Cement Co. v. Detroit,** 362 U.S. 40 (1960); **Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R.I. & P.R.,** 393 U.S. 1972 (1968).

This option of flexibility gives the court the opportunity to consider the innumerable variables and complexities which must be reconciled in determining the effect of a state statute on interstate commerce.

The power of the state to enact laws which substantially or materially impose on the free flow of commerce or regulate those areas of national commerce where uniformity is necessary has been precluded from the time of **Gibbons v. Ogden**, supra, forward. See also, **Cooley v. Board of Wardens** 12 How. 299 (1851); Minnesota Rate Cases (**Simpson v. Shepherd**), 230 U.S. 352 (1912); **Southern Pacific v. Arizona**, 325 U.S. 761 (1945); **Bibb v. Navajo Freight Lines**, 359 U.S. 530 (1959); **Florida Lime and Avocado Growers v. California**, 373 U.S. 132 (1963); **Pike v. Bruce Church, Inc.**, 397 U.S. 137 (1970). As stated by the Supreme Court in **Southern Pacific v. Arizona**:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority." **Southern Pacific v. Arizona**, 325 U.S. 761, 767 (1944).

Interstate commerce by sea is of a national character within the exclusive power of Congress. **Philadelphia & S. Mail SS. Co. v. Pennsylvania**, 122 U.S. 326 (1887). The power of Congress to regulate interstate commerce is exclusive when its subjects are national in character or admit of only one uniform system or plan of regulation. **Philadelphia & S. Mail SS. Co.**, supra; **Robbins v. Shelby**, 120 U.S. 489 (1887); **Southern Pacific Co. v. Jensen**, supra; **Knickerbocker Ice Co. v. Stewart**, 253 U.S. 149 (1920).

A problem is national where its solution requires uniform treatment throughout the nation and remedial legislation can only be given by Congress, the one body that can give uniform control.

In denying Arizona the power to prescribe the length of interstate trains going through that state, the United States Supreme Court reasoned that the matter of train length was not a problem for any one state to effectively control. Said the Court:

> "The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nationwide authority are apparent." **Southern Pacific v. Arizona**, 325 U.S. 761, 775 (1945)

The problem presented for determination is the extent to which the State of Florida may burden maritime commerce by the enforcement of oil spillage and pollution control regulation which interferes with the uniformity of an area of interstate and foreign commerce in which Congress has already taken the initiative and which, due to the inherent aspects of the problem, requires a uniform approach on a national level.

At the time of trial in the court below, two states required evidence of financial responsibility to operate vessels transporting oil within their waters (F.S. 376.12 and Mass. St. 827, Sec. 50B). These statutes are in conjunction with and a duplication of the provisions of the Federal Water Quality Improvement Act, 33 U.S.C. 1161(p). There were five states which charged their executive branches with the promulgation of operating and inspec-

tion rules and requirements for oil transporting vessels (Maine, Title 38, Sec. 546(4)(a); Florida, F.S. 376.07; Mass. St. 837, Sec. 4.0; Act. 167, Public Acts of 1970; Michigan, Sec. 3-533 (209), C210; and Wash., RCW 88.8, 11). The Florida Act also requires the development of minimum standards as to containment equipment and crew training in the use thereof. In addition to these laws presently in force, Georgia and New York were considering oil pollution spill regulatory measures. The New York bill would have required all tankers operating in state waters to install anti-spill equipment; **Environmental Reporter, Current Development,** 46:1229 (1971).

Thus, the proliferation of oil pollution statutes by state legislatures portrays the overburdening character of the state enactments when viewed as a whole.

It is in this context that the doctrine of uniformity is invoked by the plaintiffs. The Florida Act subjects the plaintiffs to another set of regulations with which they must conform, in addition to those provided for by the Federal Water Quality Improvement Act of 1970, in order to operate in maritime commerce.

If a state cannot, as an isolated unit, cope with an economic problem, the matter will be of national concern. A state may not impose a burden which materially affects commerce in an area where uniformity of regulation is necessary. **Huron Portland Cement Co. v. Detroit,** supra.

The interest of the other states is nowhere more clearly demonstrated than in the fact that the states of California, Connecticut, Delaware, Georgia, Hawaii, Maryland, Massachusetts, Michigan, North Carolina, New York, Texas, Virginia, and Washington, have filed Briefs Amici Curiae in this case.

CONCLUSION

The United States Supreme Court throughout its history has been diligent in preserving the unique constitutional concept of separation of powers within our government. This diligence has been manifested by a consistent refusal by the Court to rule on the wisdom of an otherwise constitutional act of Congress.

> "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." **United States v. O'Brien**, 391 U.S. 367, 384 (1968).

Mr. Justice Brandeis gave a long list of support for this rule in **Arizona v. California**, 283 U.S. 423 at 455 (1931). In **United States v. Pabst Brewing Co.**, 384 U.S. 546 at 552 (1966), this Court refused to rule on the wisdom of a congressional policy decision that mergers which may substantially reduce competition are forbidden. In **Ferguson v. Skrupa**, 372 U.S. 726 (1963), this Court stated that it was not to sit as a superlegislature. **McCray v. United States**, 195 U.S. 27 at 49 (1904), gives the following rule:

> "'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.'"

Pages 21 to 41 of the State's Brief are devoted to a detailed exposé of the reasons why the Florida Act is a better piece of legislation than the Federal laws on the same subject. The State strongly seeks to maintain that the absolute unlimited liability of the Florida Act is wiser than the limited liability and allowable defenses provided for in the congressional enactments. On page 39, the Appellant takes note of the fact that unlimited absolute liability was debated during the congressional hearings which led to the W.Q.I.A. Congress rejected this concept of oil pollution control. Possibly Congress realized that shippers could not obtain insurance if placed under unlimited, absolute liability. Possibly Congress felt the 14 million dollar limit would be sufficiently high to cover almost every spill but still prevent the total dissemination of vital shipping interest. Possibly Congress realized that

land based property owners obtain insurance to protect their property. At any rate, the point to be made is that Congress did not accept this concept and now the State wishes this Court to rule on the wisdom of the congressional action and superimpose absolute unlimited liability for oil spills where Congress specifically excluded it.

Interlaced through the entire body of the Appellant's brief is a continuing assertion that oil spills and pollution are bad and pure water is good. If this were an issue in this case the Appellee would gladly stipulate to these facts. The parade of horribles which the Appellant marches before the Court as to the various oil pollution disasters is not required to prove that oil spills are destructive. At issue in this trial is not whether oil pollution is evil (which it is), not who holds the greatest love for Florida's beautiful waters, beaches and fish (we all love them), and not what is the best method as to controlling oil pollution. The issue is who shall be the lawmaker to regulate the prevention of interstate and international oil pollution in our oceans and navigable waters. The Appellees maintain that the Constitution, both directly through the admiralty jurisdiction and indirectly through the doctrine of statutory preemption, gives the Congress the power to legislate in this area. This power is exclusive and even if it were not, Congress has acted pursuant to its constitutional powers and has covered the field.

Not only the Constitution but also the rule of reason excludes state legislation in this area. The mere fact that 13 states have filed Amici Curiae briefs on behalf of Florida's alleged right to legislate in this area shows that there is a desire and probability that other states will seek to legislate as Florida has if its action is allowed to stand.

Indeed, many states have already done so. See Maine Title 38 Sections 541-557 (1970); Massachusetts, Clean Water Act (1968, 1969, 1970) Annotated Laws of Massachusetts, Chapter 21 Sections 27(10), 50-52; Michigan Water Pollution Control Act of 1970, Act 167, 1970; Washington, Revised Code of Washington (RCW 90.48.315, et seq.); and Alaska, Statutes Title 46, Chapter 05 (1968, 1970).

Aside from the constitutional reasons why Florida cannot act in the field of admiralty, which is the most efficient method to combat the oil pollution hazard: (1) With a myriad of separate conflicting statutes and regulatory schemes from the 23 coastal states as well as the other states with navigable waterways; **OR** (2) Should the nation act as a unit to combat this national problem by congressional statute and implementing regulatory scheme? Obviously, the latter. The uniformity requirement in admiralty did not evolve by accident. Admiralty is the example **par excellence** of the type problem which causes men and states to come together and form nations. For it is not just oil spills that are of national concern, but also the industry to be governed.

Shipping by navigable water in the United States has always been controlled and fostered by the federal government. There exists no vacuum in obligations. The new federal program is complete and it is effective. If it fails —if there appears a leakage of responsibility, the breakdown can be easily detected, and any wrong duly redressed. All the people of the nation are thus served by their own design, for their own benefit, and as chartered in their own Constitution.

For the above reasons, Chapter 70-224, Laws of Florida, is unconstitutional as an attempt by the State of Florida to legislate substantial maritime law which, under Article III, Section 2, Clause 3, of the United States Constitution, is exclusively within the federal domain. The Florida Act likewise violates the Commerce Clause in that it seeks to regulate foreign and interstate commerce and is in direct conflict with federal statutes in an area which has been preempted by the federal statutes.

Respectfully submitted,

LeROY COLLINS,
of Counsel
ERVIN, VARN, JACOBS & ODOM

JOSEPH C. JACOBS
of the law firm of
ERVIN, VARN, JACOBS & ODOM
Post Office Box 1170
Tallahassee, Florida 32302
and
JOHN B. CHANDLER, JR.,
ROGERS, TOWERS, BAILEY,
JONES & GAY
Florida Title Building
Jacksonville, Florida 32202
and
STEWART D. ALLEN
Sunset House
5825 Sunset Drive
South Miami, Florida
Attorneys for Appellees

CERTIFICATE OF SE[illegible]F SERVICE

I HEREBY CERTIFY that a t[illegible]t a true and correct copy of the BRIEF OF APPELLEES ha[illegible]S has been furnished to all parties of record this 11 day of [illegible]y of August, 1972.

Attorney